

DOCKET FILE COPY ORIGINAL

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20054**

**JUN 3 - 1996**

In the Matter of )

Implementation of the Local )  
Competition Provisions in the )  
Telecommunications Act of 1996 )

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

CC Docket No. 96-98

**SUPPLEMENTAL REPLY COMMENTS OF  
TELEPORT COMMUNICATIONS GROUP INC.**

**J. Manning Lee**  
Vice President, Regulatory Affairs  
718-355-2671

**Teresa Marrero**  
Senior Regulatory Counsel  
Teleport Communications Group Inc.  
Two Teleport Drive, Suite 300  
Staten Island, NY 10311  
718-355-2939

Date: June 3, 1996

No. of Copies rec'd 0 + 17  
List ABCDE

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20054**

In the Matter of	)	
	)	
Implementation of the Local	)	CC Docket No. 96-98
Competition Provisions in the	)	
Telecommunications Act of 1996	)	

**SUPPLEMENTAL REPLY COMMENTS OF  
TELEPORT COMMUNICATIONS GROUP INC.**

Teleport Communications Group Inc. ("TCG") hereby submits its second set of Reply Comments on the Commission's Notice of Proposed Rulemaking<sup>1</sup> regarding implementation of the Telecommunications Act of 1996 ("1996 Act").<sup>2</sup> This Supplemental Reply focuses on the Comments regarding access to rights-of-way.

**I. INTRODUCTION**

As TCG stated in its May 20, 1996 Comments, and contrary to the assertions made by certain incumbent local exchange carriers ("ILECs"), the 1996 Act explicitly requires that the Commission promulgate regulations implementing the amendments of the Pole Attachment Act, as incorporated by the 1996 Act. TCG believes that there are several

---

<sup>1</sup>Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-182, released April 19, 1996 ("NPRM").

<sup>2</sup>Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

important issues that must be addressed. First, the Commission must establish national, uniform standards for determining available capacities. These standards will limit the risk that utilities may abuse the exception set forth in the 1996 Act that access need not be made available if there is insufficient capacity.<sup>3</sup> Second, the applicant should be able to appeal any denial of access to a pole, duct, conduit or right-of-way under fair, reasonable, and rapid procedures. Third, and most significantly, the Act grants the FCC enforcement powers. The Commission's rules should clarify that an applicant may opt for federal jurisdiction for enforcement and appeal of any matter related to a pole attachment issue, as well as obtain injunctive relief in any federal court.

The Comments filed by several ILECs claim, however, the position that the Commission has little or no authority to implement the nondiscriminatory access requirements set forth in the 1996 Act. As discussed more fully herein, the ILECs have apparently misconstrued the language and intent of the 1996 Act in a way that, if adopted, would seriously impede local exchange competition.

---

<sup>3</sup>Sec. 224(f)(2). MFS also raised this concern and proposed that the Commission's rules should provide that access may not be refused due to insufficient capacity if it is possible to rearrange the existing facilities using the pathway to accommodate the new user. For example, in the case of underground installations, it is often possible to accommodate additional users by installing innerduct in the existing conduit, removing dead cables, or repairing damaged duct. In the case of pole attachments, it may sometimes be possible to move existing attachments. MFS Comments at 10.

**II. THE 1996 ACT EXPLICITLY MANDATES THE COMMISSION TO IMPLEMENT SECTION 251, INCLUDING THE OBLIGATION OF LECs SET FORTH IN SECTION 251(b)(4).**

Several of the ILECs misconstrue the language set forth in Section 251(b)(4) of the Act, and argue that it eradicates, or at least severely limits, the FCC's ability to create national, uniform, access standards.<sup>4</sup> U S West, for example, states that "any attempt by the Commission to articulate and implement detailed national standards on use of poles, conduits and rights-of-way would be futile."<sup>5</sup> NYNEX takes a similar position, stating that the FCC's rules may not be controlling if a state regulates access to poles, ducts, conduits and rights-of-way pursuant to Section 224(c) of the Act.<sup>6</sup> NYNEX further asserts that Section 251(b)(4) of the 1996 Act severely limits the FCC's ability to regulate these rights-of-way issues because the section states that access must be based on "terms, and conditions that are *consistent with section 224*."<sup>7</sup> In essence, these parties argue that because the FCC

---

<sup>4</sup>Section 251(b)(4) assigns to LECs "The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224."

<sup>5</sup>U S West Comments at 15.

<sup>6</sup>NYNEX Comments at 11.

<sup>7</sup>*Id.* at 11-12. Section 224(c)(1) states:

Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits and rights-of-way as provided in subsection (f), for pole attachments *in any case where such matters are regulated by a State*.

does not have jurisdiction over pole attachment *rates* where states properly regulate them, the FCC cannot adopt implementing regulations.

However, what NYNEX and others fail to recognize is that the obligations set forth in Section 251(b) apply to LECs and should not be read to limit the ability of this Commission to mandate regulations that will foster competition through rules implementing nondiscriminatory access. Stated another way, Section 224(c)(1) of the Act applies to the Commission's *jurisdictional* authority over rates and does not deprive the Commission of its ability to implement national rules that govern how LECs or state commissions fulfill those obligations. This interpretation is clearly consistent with Section 251(d) of the 1996 Act, whereby the Commission is directed to "establish regulations to implement the requirements" of Section 251, while the state commissions are required to review and approve the agreements implementing the 1996 Act and the FCC's rules. When read together, Section 224 and Section 251(d) achieve a similar result. Section 224 of the Act gives the Commission "jurisdiction" of the specific implementation with respect to rates, terms and conditions or access to poles, ducts, conduits and rights-of-way, unless the state has effective rules and regulations implementing the state regulatory authority, while Section 251(d) expressly requires the Commission to set uniform, national regulations with which the states' regulations must comply.

Even if the Commission were to construe the language of the Act to mean that the FCC's rules would only apply in cases where such pole attachment matters were not regulated by the states, as stated in Section 224(c)(1), the Commission must interpret Section

224(c) in its entirety. Section 224(c)(3) states that "a state shall not be considered to regulate the rates, terms, and conditions for pole attachments unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments . . . ." Thus, the full state proceedings and implementation rules must be completed and made effective before the FCC's ability to regulate is restricted. Thus, there remains an important role for the Commission to play in establishing national regulations, because not all states regulate these issues, and, to the best of TCG's knowledge, no state has yet adopted regulations to implement the pole attachment requirements imposed by the 1996 Act.

### III. CONCLUSION

TCG urges the Commission to adopt explicit, uniform rules which will set the framework by which states should regulate access to poles, ducts, conduits, and rights-of-way. Such rules will offer consistency among the states and help expedite facilities-based competition by encouraging and expediting the necessary access to poles, conduits, and rights-of-way. While Section 251(b)(4) and Section 224(c) may not change the FCC's jurisdiction over pole attachment *rates*, Section 251(d) clearly gives the FCC authority to

establish national regulations governing how LECs must satisfy their obligations to make available fair and reasonable access to these essential facilities.

Respectfully submitted,

TELEPORT COMMUNICATIONS GROUP INC.

By: Teresa Marrero  
Teresa Marrero  
Senior Regulatory Counsel - Federal  
One Teleport Drive, Suite 300  
Staten Island, NY 10311  
718-355-2939  
Its Attorney

Of Counsel:

J. Manning Lee, Esq.  
Vice President, Regulatory Affairs  
718-355-2671

June 3, 1996